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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 694

UNITED STATES OF AMERICA

v.

GEORGE OTIS SMITH

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE

STATEMENT

This proceeding to test the right of the respondent to hold office could only be maintained in the name of the United States and with the consent and on the relation of an official of the Department of Justice. That consent was given out of proper deference for the desire of the Senate to have the case presented for judicial decision. As the officials of the Department of Justice were already committed by an opinion of the Attorney General (36 Ops. Atty. Gen. 382) to a conclusion adverse

to the position taken by the Senate, consent to the institution of this proceeding was given on condition that the Senate would employ its own counsel and that officials of the Department of Justice would not support the petitioner. This explains why officials of the Department appear *amici curiae*.

The respondent, George Otis Smith, was nominated by the President to be a member of the Federal Power Commission, and on December 20, 1930, the Senate considered the nomination and "resolved that the Senate advise and consent to the appointment of the above-named person to the office named agreeably to his said nomination." Thereupon the President pro tempore stated "the Senate advises and consents to the nomination and the President will be notified," which statement met with no objection.

Thereupon and in the usual course an entry was made upon the executive journal of the Senate for December twentieth as follows: "*Ordered,* that the foregoing resolution of confirmation be forwarded to the President of the United States," and on the same day the following order was entered: "*Ordered,* that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

On December 22, 1930, an official messenger of the Senate delivered to the President a notification which, in accordance with the established practice,

was a certified copy of the resolution advising and consenting to the appointment. Thereupon, on December 22, 1930, the President signed and delivered a commission to George Otis Smith, purporting to appoint him a member of the Federal Power Commission, and on the same day Smith took the oath of office and entered upon the discharge of his duties. Thereafter and on January 5, 1931, and before the expiration of two executive session days after the passage of the original resolution of December twentieth, the Senate adopted a resolution requesting the President to return to the Senate the resolution consenting to Smith's appointment. This the President declined to do.

Without attempting to restate the case, we may stress certain facts which are of controlling importance.

First. There is a rule of the Senate (Paragraph 3, Rule XXXVIII) providing that when a nomination is confirmed or rejected a motion for reconsideration may be made on the day on which the vote was taken or on either of the next two days of actual executive session of the Senate; but "if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate."

Second. Another provision of Rule XXXVIII is (Paragraph 4): "Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, *unless otherwise ordered by the Senate.*" (Italics ours.)

Third. Another rule provides (Rule XL): "Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided in clause 1, Rule XII." The exception is not material here.

Fourth. The rules expressly recognize that notification of consent to an appointment may be sent to the President by order of the Senate before the expiration of the time allowed by the rules for reconsideration.

Fifth. The rule of the Senate allowing reconsideration within two executive session days may be suspended or abrogated in a particular case by unanimous consent.

Sixth. In this case the Senate by unanimous agreement determined forthwith to notify the President of its consent without waiting for the expiration of the reconsideration period and did so notify him. It is conceded that the action of the Senate amounted to a unanimous agreement to direct its Secretary to give the notification *forthwith* and without waiting for the expiration of the time allowed for reconsideration.

Seventh. The rules and practices of the Senate do not provide for more than one notification or for any second notification where notification is ordered sent to the President before the expiration of two executive session days after confirmation.

QUESTION PRESENTED

The question presented is whether the action of the Senate in this case taken by unanimous consent, forthwith notifying the President that it consented to the appointment, interpreted in the light of all its rules and practices, discloses the intention of the Senate to express to the President its unqualified consent to an immediate appointment and as a decision by the Senate to forego the opportunity to reconsider its action or withdraw its consent or, on the other hand, whether the notification was intended as a preliminary notice of a tentative consent not to be acted on by the President until inaction or further action by the Senate made its consent final.

SUMMARY OF ARGUMENT

By its action the Senate either gave its unconditional consent to immediate appointment or withheld its full and final consent. Either the appointment was valid and beyond the power of the Senate to disturb or it was premature and void. The theory that the Senate gave its consent to an immediate appointment with the qualification that the appointment could be nullified by a reconsideration by the Senate is inadmissable.

The question is one of the intention of the Senate to be ascertained from its action interpreted in the light of its established rules and practices and with the application of a little common sense.

The Senate rules contemplate that the Senate may decide to give its final consent without waiting for the expiration of the two executive session days. The rule allowing reconsideration in that period is subject to suspension by unanimous consent. The decision of the Senate forthwith to notify the President of its consent shows a purpose to allow immediate action by the President. The object of expediting the notification was to expedite the appointment. The Senate's conclusion, by unanimous consent, to notify the President forthwith, amounted to a waiver of the rule allowing later reconsideration, and a decision by the Senate to reach a final conclusion then and there and so advise the President. After that action was taken and notification given, only a change of mind on the part of the Senate and a withdrawal of its consent, communicated to the President before the appointment was made, could have enabled the Senate to prevent the appointment.

ARGUMENT

Three suggestions have been made as to the possible purpose and effect of the Senate's action in sending notification to the President that it consented to the respondent's appointment:

First. That the President was authorized to make an appointment forthwith but subject to its becoming ineffective through reconsideration of the nomination by the Senate;

Second. That the consent so given, of which notification went to the President, was a conditional and qualified consent not representing the final conclusion of the Senate, and therefore the appointment was premature and unauthorized;

Third. That the Senate's action shows unconditional and unqualified consent to an immediate appointment, effective because the Senate did not recant and withdraw its consent, and notify the President of its withdrawal, before appointment was made.

The first position is wholly untenable. The consent required by the Constitution is an unconditional consent to an unconditional appointment.

Either this appointment was valid because made with the unqualified consent of the Senate or it was void. There is no middle ground. Any other view would allow the Senate to encroach upon executive functions by removing an officer after his appointment under the guise of reconsideration of his nomination and because of dissatisfaction with his official acts.

We mention this theory merely because it was suggested in the debates on this case in the Senate. The petitioner does not seem to rely on it, and it seems to be conceded now that the question is

whether the consent was unqualified and the appointment valid, or whether final consent was never given and the appointment was premature and void. Approaching the case this way, there is no constitutional question presented, and we are left merely with the question whether the Senate intended unqualifiedly to consent and so advise the President, and that is to be resolved by considering what the Senate did, in the light of its rules and practices, reasonably construed.

One provision of the rules is that when a nomination is confirmed a motion for reconsideration may be made within either of the next two days of actual executive session. This must be read in connection with Paragraph 4 which provides that a nomination confirmed or rejected shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider or while such motion is pending "unless otherwise ordered by the Senate." The rule in paragraph 4 was intended to protect and preserve the power of the Senate to reconsider. It is based on the assumption that if the notification goes to the President before the time allowed by the rule for reconsideration has elapsed and the President makes the appointment, the power to reconsider will be lost. The rules also expressly contemplate that before the time fixed by the rule for reconsideration has expired or even while a motion for reconsideration is pending, the Senate may order an

immediate notification of its consent to the appointment to be transmitted to the President. In this case the Senate resolved that it consented to the appointment and it unanimously resolved that the President be immediately notified that it did consent. Its action in directing that the President be forthwith notified without waiting for the expiration of the time allowed by the rule for reconsideration must have had some purpose. Why order immediate notification to be sent to the President unless he was expected to act upon it? The only conceivable object in expediting the notice was to make it possible for the President to expedite the appointment, and to enable the President immediately to fill the vacancy and to serve the public interest by avoiding delay in the transaction of public business.

No second notice to the President is provided for by Senate rules or practices, and if the one sent be not effective so that the President may rely on it, he never would receive a notification of final consent. The petitioner's position is that before it has consented the Senate may send a notification that it has, and then after it has really consented, it sends no notice. Why do a futile thing—unanimously resolve to notify the President forthwith and rush a special messenger to the executive offices, if the action is not final and the President may not proceed? Why send a formal, expedited notification on which the President can not rely, and then refrain from

giving him a notice of final decision of the Senate and compel him to cause the records of the Senate to be searched to ascertain whether a motion for reconsideration has been made and lost, or two executive sessions have been held without a motion for reconsideration having been made? The fallacy of the petitioner's argument is in the conclusion that the rule allowing reconsideration was an inexorable thing which the Senate itself could not escape from. It involves also the mistaken assumption that the rule which provides for recalling notifications from the President contemplates that in all cases the recall will be in time and successful.

Any rule of the Senate may be suspended in a particular case by unanimous consent. Whether an order of the Senate for immediate notification is in accordance with the rules and requires only a majority vote or amounts to a suspension of the rules requiring unanimous consent is immaterial here. Acting in this case by unanimous consent immediately to notify the President, it did not expressly resolve to refrain from any further consideration and suspend the two executive session day rule, but its action is susceptible of no other interpretation. A decision to notify the President forthwith that it had consented to the appointment necessarily implies that it had decided then to reach a final conclusion.

The precedents indicate that no President has ever questioned the power of the Senate to recon-

sider and withdraw its consent to an appointment if notice of the withdrawal reaches him before the appointment is made.

A discussion of the precedents cited by the petitioner will be left to be made by the respondent, but some points deserve mention.

These precedents tend to support the view that the question that has always been uppermost, and the subject of particular inquiry, has been whether notice of the withdrawal of the Senate's consent reached the President before the appointment was made. We have been unable to find a case in which the Senate actually proceeded to reconsider and reject a nomination once confirmed, where it clearly appears that an appointment had been made by the President before information reached him of the Senate's move to withdraw its consent.

In dealing with these cases, it is evident that those involved did not always have a clear and consistent idea as to what constituted an appointment or whether merely signing a commission effected it.

The cases are also complicated by the fact that the President has the power to remove executive officers, and although an appointment had been made before the Senate undertook to reconsider, he could, by withholding delivery of the commission and thus depriving the appointee of an opportunity to take the oath, followed by nomination and

appointment of another, in effect remove the appointee. Such was the Plimley case. (R. 97.)

In this connection we question the assumption by the petitioner that an entry in the White House records of the "date of commission" or "date commissioned" necessarily means that the commission was signed on the date entered. It may or may not have been. The date so entered is the date the commission bears but not necessarily the date the President signs it. There is evidence of this in the record in this case. See case of James A. Cobb (R. 108–109), where notification was not received until March 18th, the entry under "Commissioned" is March 17th, and the entry under "Remarks" shows the commission was signed June 12th; case of Charles R. Ligon (R. 109), where the receipt for the notification is dated May 6th, the entry under "Commissioned" is May 5th, and the entry under "Remarks" shows the commission was signed May 28th; see also case of Walter L. Cohen (R. 107).

The petitioner's argument is based on the premise that the Senate, though sending the notification, intended to reserve the power to reconsider, and our position is that it did not so intend. If our contention be accepted, questions as to whether the President is presumed to know the rules, or as to whether the President had a right to rely on a notification which was false or premature, or whether the Senate lost jurisdiction by parting with the papers, are eliminated from the case.

The proper conclusion is that by its action in this case the Senate intended to give its unqualified consent to an immediate appointment, and that its action directing notification to be sent forthwith and without waiting for the expiration of the time fixed by the rule for reconsideration, taken by unanimous agreement, amounted to an abrogation in this case of the rules allowing further consideration and discloses the intention of the Senate then and there finally to consent to the appointment and to communicate that consent to the President for immediate action.

The situation is somewhat anomalous in that counsel for the Senate representing the petitioner are here contending for one interpretation of the Senate's rules and action, but the Senate itself since this case arose has repeatedly and without any uncertainty followed a practice consistent only with our position on the law. We need only refer to a few instances disclosed in the Congressional Record, which are set forth in the Appendix. These extracts from the Congressional Record show beyond question that the Senate understands that under its present rules unanimous agreement to notify the President of its consent to an appointment, without waiting for the expiration of the time fixed by the rules for reconsideration, although

without any express mention of the rule about reconsideration, amounts to a decision of the Senate to give unqualified consent to the appointment.

Respectfully submitted.

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ERWIN N. GRISWOLD,
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MARCH, 1932.

APPENDIX

71ST CONGRESS, 3RD SESSION

Congressional Record, Volume 74, Part 7

Pp. 6489–6490, February 28, 1931:

The Chief Clerk read the nomination of Louie W. Strum to be United States district judge, southern district of Florida (additional position).

The PRESIDENT pro tempore. Without objection, the nomination is confirmed.

Mr. FLETCHER. Mr. President, this judge is very much needed, and has been for some months. He is approved by both Senators from Florida, and was unanimously approved by the subcommittee of the Committee on the Judiciary and by the full Committee on the Judiciary. There is no opposition on record. I ask unanimous consent to waive the rule about two subsequent executive sessions, and that the President be notified with regard to this action.

The PRESIDENT pro tempore. Is there objection to the request of the Senator from Florida that the President be notified of the action taken in the confirmation of Judge Strum? The Chair hears none, and the President will be notified.

On January 9, 1931 (Vol. 74, Part 2, pp. 1748–1749), on January 10, 1931 (*Id.*, p. 1937), on January 13, 1931 (*Id.*, p. 2066), and on January 28, 1931 (Vol. 74, Part 3, p. 3393) objection was made when the presiding officer announced that without

objection the President would be notified. In the case of all other confirmations during this session (after January 10, 1931) the announcement of the presiding officer was simply "the nomination is confirmed."

72D CONGRESS, 1ST SESSION

December 21, 1931—Cong. Rec., p. 1003

The following proceedings are recorded:

NOTIFICATION TO THE PRESIDENT

Mr. COUZENS. Mr. President, I am informed that unless we have unanimous consent to notify the President of the confirmation of the nominations to the Interstate Commerce Commission and the Board of Mediation, those gentlemen whose nominations were to-day confirmed can not hold office until after two executive sessions shall have been held.

The VICE PRESIDENT. The Senator from Michigan is correct.

Mr. COUZENS. I ask unanimous consent, then, that the President be notified of those confirmations.

Mr. MCNARY. Mr. President, if the Senator will withhold that request just a moment——

Mr. COUZENS. Certainly.

Mr. MCNARY. I wish to move that all confirmations made on the 17th and 18th and to-day be released and the President be notified. That will cover them all.

The VICE PRESIDENT. Is there objection? The Chair hears none, and it is so ordered. The order includes the confirmations of to-day. The President will be notified.

December 22, 1931—Cong. Rec., p. 1131

The following proceedings are recorded:

COAST GUARD

Robert B. Adams of Massachusetts, to be engineer in chief for a period of four years, to rank as such from December 18, 1931, a reappointment.

The VICE PRESIDENT. The question is on confirming the nomination.

The nomination was confirmed.

Mr. COPELAND. Mr. President, I ask unanimous consent that the President be notified.

The VICE PRESIDENT. Is there objection?

Mr. NORRIS. Mr. President, I would like to make an inquiry about that. Is there any reason why the President should be notified?

Mr. COPELAND. Yes; this man's appointment expired on the 18th of December, and it is very important that he be immediately put on duty.

The VICE PRESIDENT. Is there objection to the request of the Senator from New York? The Chair hears none, and the President will be notified.

FEDERAL POWER COMMISSION

Mr. KENDRICK. Mr. President, at the request of and for the Senator from Michigan [Mr. Couzens], I desire to report from the Committee on Interstate Commerce favorably the nomination of Claude L. Draper, of Wyoming, to be a member of the Federal Power Commission. I ask unanimous consent for the immediate consideration of the nomination.

Mr. KING. Mr. President, will the Senator permit me to ask him a question?

Mr. KENDRICK. Certainly.

Mr. KING. Is the Senator from Montana satisfied?

Mr. KENDRICK. The Senator from Montana has agreed to the confirmation of this nomination.

Mr. SMITH. What was that nomination, Mr. President?

The VICE PRESIDENT. The nomination of Claude L. Draper to be a member of the Federal Power Commission.

Mr. SMITH. That is all right.

The VICE PRESIDENT. Is there objection to the present consideration of the nomination? The Chair hears none, and the nomination is confirmed.

Mr. KENDRICK. Mr. President, I ask unanimous consent that the President be notified.

The VICE PRESIDENT. Is there objection?

Mr. NORRIS. Mr. President, we have had so much difficulty about notifying the President in connection with nominations to the Federal Power Commission that I think we had better let this nomination take its regular course. He will find it out in some way.

The VICE PRESIDENT. Are there further reports of committees? If not, the calendar is in order.

February 1, 1932—Cong. Rec., p. 3071

The following proceedings are recorded:

NOTIFICATION TO THE PRESIDENT FOR CONFIRMATIONS

Mr. ROBINSON of Arkansas. Mr. President, inasmuch as the presence of a quorum has just been announced, I desire to ask the

attention of the Senate to a matter of some importance.

On Thursday, the last day the Senate was in session, there was a confirmation of three appointees to serve on the Reconstruction Finance Corporation board. It is believed that there is necessity for the board to function immediately. I therefore ask unanimous consent, as in executive session, that the Secretary be directed to notify the President of the confirmation of the nominations to which I have referred.

The VICE PRESIDENT. Is there objection? The Chair hears none, and the Secretary is authorized to notify the President of the confirmation of the nominations.

February 3, 1932—Cong. Rec., p. 3415

The following proceedings are recorded:

The Chief Clerk read the nomination of Wilson McCarthy, of Utah, to be a member of the board of directors of the Reconstruction Finance Corporation for a term of two years from January 22, 1932.

The PRESIDENT pro tempore. Without objection, the nomination is confirmed.

Mr. KING. Mr. President, the board is now in session and has been for several days, except for Mr. McCarthy, who has not been a member heretofore. In view of the situation and the exigency of the case I ask that the President be notified.

The PRESIDENT pro tempore. Is there objection? The Chair hears none, and the President will be notified.

Februray 5, 1932—Cong. R., p. 3582

The following proceedings are recorded (confirmation of Mr. Mellon):

> The VICE PRESIDENT. The question is on confirming the nomination. [Putting the question.] The ayes have it, and the nomination is confirmed.
>
> Mr. REED. Mr. President, as is obvious to the Members of the Senate, there is an automatic change taking place in the board of directors of the Reconstruction Finance Corporation, Mr. Mellon going off the board and Mr. Mills, if he is appointed, taking his place, and the new Under Secretary, whoever he may be, going on as a member ex officio.
>
> I am well aware of the settled policy of the Senate regarding notifying the President in advance of the period available for reconsideration, but for the reasons stated by the Senator from Arkansas [Mr. Robinson] the other day, in expediting the notice of the confirmation of members of the board of the Reconstruction Finance Corporation, I ask unanimous consent that the President may now be notified of the confirmation of Mr. Mellon.
>
> The VICE PRESIDENT. Is there objection? The Chair hears none, and the President will be notified that the Senate advises and consents to the nomination.

On February 10, 1932, when Messrs. Mills and Ballantine were confirmed, objection was made to the immediate notification of the President (Cong. Rec., p. 3782), but on February 11, 1932 (Cong. Rec., p. 3881), the following proceedings took place:

NOTIFICATION OF THE PRESIDENT

Mr. SMOOT. Mr. President, on yesterday I asked unanimous consent that the President be notified of the advice and consent of the Senate to the nominations of Ogden L. Mills to be Secretary of the Treasury and Arthur A. Ballantine to be Under Secretary of the Treasury. At the time the Senator from Nebraska [Mr. Norris] objected. I have been promised by him that if I would bring up the matter to-day he would have no further objection to the request. I therefore renew my request that the President be notified of the advice and consent of the Senate to the nominations referred to.

The VICE PRESIDENT. Is there objection?

Mr. NORRIS. Mr. President, the Senator from Utah came to see me to-day about my objection made on yesterday. I understand it is desirable that these gentlemen be installed in their respective offices in order that there may be no interference with a prearranged high-class social function. Of course, I do not want to interfere with anything of that nature, so I withdraw my objection.

The VICE PRESIDENT. Without objection, the President will be notified that the Senate advises and consents to the nominations.

On February 17, 1932, Mr. Grew was confirmed as Ambassador at Tokio, but no order to notify the President was made. On February 24, 1932, the next day of actual executive session, the following proceedings are recorded (Cong. Rec., p. 4724):

NOTICE OF CONFIRMATION OF AMBASSADOR TO JAPAN

Mr. BORAH. A few days ago the Senate confirmed the nomination of Joseph C. Grew, to be ambassador extraordinary and plenipotentiary to Japan. Since that time we have not had an executive session. I desire to ask, as in executive session, that the President be notified of the confirmation.

The VICE PRESIDENT. In the absence of objection, it will be so ordered, and the President will be notified.

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